Tool protects open discourse

Everett Herald
June 10, 2015

Money can come in handy.

Those with enough of it can threaten to sue anyone who questions them, criticizes them or blows the whistle on their misdeeds. Never mind who's right, who's wrong or how much a lawsuit might cost.

Now, imagine you're an honest employee who speaks out about his shady superiors. Instead of public acclaim, you receive notice that you'll be spending your life savings and several years in a lawyer's office.

It's a wonder that activists ever dare to butt heads with the rich and powerful.

It's daft that journalists ever dare to make enemies among vengeful bureaucrats or corporate honchos.

And it's the reason that Washington stepped out ahead of many states in 2010 to enact an anti-SLAPP statute — the acronym standing for “strategic lawsuits against public participation.”

With this law, the Legislature declared that open discussion of important matters should be protected from the thundering of lawyers and the blizzard of court filings that monied interests can unleash.

But the anti-SLAPP statute is no more.

Late last month, the state Supreme Court invalidated the law. In their unanimous decision, the justices declared the statute violated Constitutional trial rights by creating a new standard for throwing a lawsuit out before it gets to trial or — more importantly — before it reaches the expensive and drawn-out process know as discovery.

Our system already allows for dismissal of cases by summary judgment. In essence, judges are asked to reach the conclusion that a plaintiff's case is unlikely to succeed as a matter of law. In creating our anti-SLAPP statute, the Legislature said the courts should dismiss a lawsuit if the plaintiffs fail to show “clear and convincing evidence” that they are likely to win their case at trial.

This means the anti-SLAPP law compelled courts to make factual findings, not just legal judgments, the Supreme Court observed. And that was the game changer.

The justices also pointed out that Washington's law was based on an anti-SLAPP statute that has been used successfully in California. But the “clear and convincing”

phrase, absent from the California statute, seems to have been added intentionally when our law was drafted.

With this analysis, the Supreme Court also points the way forward.

As legislators prepare for their next session (assuming they ever finish the current one) they need to rewrite and reintroduce an anti-SLAPP statute that will stand up in court.

Unfettered discussion of important issues requires this kind of protection. We should try again.